INNOCENCE PROJECT
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TESTIMONY OF REBECCA BROWN

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BEFORE THE CONNECTICUT JOINT JUDICIARY COMMITTEE

RE: HOUSE BILL NO. 5273, AN ACT CONCERNING EYEWITNESS IDENTIFICATION

MARCH 10, 2010

Chairman McDonald, Chairman Lawlor, and Members of the Judiciary Committee:

My name is Rebecca Brown and I am the Policy Advocate for the Innocence Project. I appreciate the opportunity to testify in enthusiastic support of HB 5273, An Act Concerning Eyewitness Identification, and I ask that my written statement be included in the record.

To date, forensic DNA testing has proven the innocence of 251 people who had been wrongly convicted of serious crimes. At least one mistaken eyewitness identification was a contributing factor in a full 76% (N= 189) of cases of wrongful conviction proven through DNA testing. The problem of misidentifications is not unique to certain geographic regions, but afflicts all law enforcement agencies nationwide, regardless of size or location. As horrible the harm to innocent people wrongfully convicted after eyewitnesses misidentify them as the perpetrator of a crime, they are not the only ones who suffer. Public safety is greatly diminished, as misidentifications cause the police to focus their investigation on an innocent person, leading them away from the real perpetrator, who is then free to commit further crimes. Furthermore, in the rare instances when the police return their focus on the actual perpetrator, the eyewitness who had previously identified an innocent person is "burned," and thus not of use in the criminal prosecution. Simply put, nobody – not the police, prosecutors, judge, jury, or indeed, the public

at large – benefits from a misidentification. The only beneficiary is the actual perpetrator.

The good news is that over the past 30 years, a large body of peer-reviewed research and practice has been developed, demonstrating how simple, inexpensive reforms to eyewitness identification procedures can greatly reduce the rate of identification error, particularly by minimizing the inadvertent misleading influences present in traditional procedures.

In the wake of leadership from the National Institute of Justice at the U.S. Department of Justice[1], the American Bar Association[2], the Police Executive Research Forum[3], the International Association of Chiefs of Police[4], the Commission on the Accreditation of Law Enforcement Agencies[5], the California Commission on the Fair Administration of Justice,[6] and others, states across the nation have taken significant steps toward eyewitness identification reform. In the past few years alone, the Georgia[7], North Carolina[8], California[9], West Virginia[10], and Vermont[11] legislatures passed legislation to advance reform, and many other states – from Rhode Island to Ohio to Oregon – are currently considering similar

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[1] Eyewitness Evidence, A Guide For Law Enforcement, United States Department of Justice (Oct. 1999).
[2] *See* ACHIEVING JUSTICE: FREEING THE INNOCENT AND CONVICTING THE GUILTY at 23-45 (Paul Giannelli et. al. eds., 2006).
[3] *See* JAMES M. CRONIN ET. AL., PROMOTING EFFECTIVE HOMICIDE INVESTIGATIONS at 35-60 (2007).
[4] *See* Int'l Ass'n of Chiefs of Police, Training Key #600.
[5] *See* Standards 42.02.11 and 42.02.12 (CALEA, a credentialing authority created through the joint efforts of law enforcement's major executive associations – IACP; National Organization of Black Law Enforcement Executives (NOBLE); National Sheriffs' Association (NSA); and the Police Executive Research Forum (PERF) – adopted these standards to require all agencies seeking accreditation to promulgate written policies regarding lineup and showup procedures, policies which must address, at minimum, the manner in which fillers are selected, warning witnesses, obtaining confidence assessments, prohibiting confirming feedback, and video and/or audio documentation of the procedure).
[6] *See* Cal. Comm'n on the Fair Admin. Of Justice, Report and Recommendations Regarding Eye Witness Identification Procedures (2006), available at www.ccfaj.org/documents/reports/eyewitness/official/eyewitnessidrep.pdf.
[7] H.R. 352, 2007 Leg. (Ga. 2007).
[8] H.B. 1625, 2007 Leg. (N.C. 2007).
[9] S.B. 756, 2007 Leg. (Cal. 2007).
[10] S.B. 82, 2007 Leg. (W.Va. 2007).
[11] S.B. 6, 2007 Leg. (Vt. 2007).

legislation. Enactment of H.B. 5273 would ensure that Connecticut's eyewitness identification procedures foster eyewitness identifications that are as accurate as possible.

The Innocence Project regards DNA exonerations as learning moments, opportunities to review where the system fell short and identify policies and procedures to minimize the possibility that such errors will impair justice again in the future. We try to ensure that our recommendations, all aimed at improving the reliability of the criminal justice system, are grounded in both robust social science findings and practitioner experience.

This testimony will summarize our support for the provisions contained within H.B. 5273 while also providing supplemental or clarifying information where necessary. Connecticut's recognition of and support for these reforms promises to help law enforcement enhance the accuracy of its criminal investigations and the legal community to assess identification evidence in a more reliable and sophisticated manner, thereby better assuring that justice is served during the course of criminal proceedings.

Misidentification is the Largest Contributor to Wrongful Convictions

Of all the causes of wrongful conviction, the most prevalent is mistaken eyewitness identification. In fact, in many wrongful convictions, it was not just one, but multiple eyewitnesses who mistakenly identified an innocent person:

- Luis Diaz, a Florida cook who was married with three children at the time of his arrest, was convicted of a string of sexual assaults and served 25 years in Florida prisons. He had been misidentified by ***eight*** witnesses.
- Kirk Bloodsworth, a former United States Marine, was convicted of having raped and murdered a

little girl in Baltimore County, Maryland based on the mistaken identification of *five* eyewitnesses. Prior to his exoneration, Mr. Bloodsworth had been sentenced to death.

- Brandon Moon, an Army veteran and college student who was released in 2005 from the Texas prison system after serving 17 years for a rape that DNA proved he did not commit, was misidentified by *five* witnesses.
- Dennis Maher, a Massachusetts man, served 19 years for a series of rapes, having been misidentified by ***three*** different victims.
- Stephen Phillips, a Texas man, was exonerated of a string of sexual assaults after serving 25 years in prison. In the 11 crimes for which Phillips was wrongfully convicted, there were at least 60 victims. At least *ten* of those victims erroneously identified Phillips as the perpetrator. Mr. Phillips was exonerated in 2008.

Connecticut, of course, is not immune to this problem; this Committee is well aware that James Tillman, one of the three individuals in Connecticut whose wrongful conviction was proven through DNA testing, was himself the victim of a mistaken identification.

Even before the exoneration of Mr. Tillman, Connecticut's Supreme Court acknowledged the fallibility of eyewitness evidence in *State v. Ledbetter*[12] and strongly encouraged police and prosecutors to reduce the inherent risk of misidentification. It is our understanding that as a result of the *Ledbetter* decision, the Connecticut Chief State's Attorney's Law Enforcement Council recommended instructing police officers to provide eyewitnesses with specific instructions, to record eyewitness statements made at the time of identification, and to document and preserve as much of the procedure as possible.

[12] *State v. Ledbetter*, 275 Conn. 534 (2005).

The Connecticut law enforcement community is to be commended for taking these important steps toward improving the accuracy of eyewitness identifications in Connecticut. Given the proven potential of reform, however, it would be entirely appropriate for the Connecticut Legislature to require uniformly that – in the interests of justice and the public safety generally – every critical eyewitness reform becomes standard procedure for all Connecticut police departments.

Mistaken Eyewitness Identifications Also Harm Victims

Jennifer Thompson and Penny Beernstein were each crime victims who identified the wrong person as their assailants, and even after DNA proved the innocence of those men, continued to believe in their guilt – until DNA also identified the real perpetrator. It was difficult for them to accept, not to mention horrifying for them to learn, that their memories of the actual perpetrator were wrong and that their mistakes sent innocent people to prison. Yet as a result of their experiences, Ms. Thompson and Ms. Beernstein are now strong advocates for the eyewitness identification reform procedures being rapidly adopted in jurisdictions around the country and contained in H.B. 5273.

Every time a witness makes a misidentification, the entire system suffers. Erroneous eyewitness identifications harm crime victims, unintentionally distract police and prosecutors' attention from the true culprit, mislead witnesses, undercut their credibility, and force innocent people to defend their innocence and possibly go to prison for crimes they did not commit. It is, therefore, imperative that eyewitness identification procedures be improved through the passage of H.B. 5273.

Lineup Protocols Should be Grounded in Best Practices & Social Science Research

From DNA exonerations we have learned that the standard non-blind lineup procedures provide many opportunities for the lineup administrator to inadvertently cause a witness to select the suspect even when

the witness is unsure that this is the person from the crime scene. In other words, traditional procedures increase identifications made as a result of witnesses guessing as opposed to actual recognition. Traditional eyewitness identification protocol (if there is any protocol at all) also often reinforces a witness's wrong choice through confirming feedback that ultimately increases their confidence in that pick, regardless of initial hesitance, in addition to contaminating the witness's memory of the actual event. Indeed, social science research has consistently confirmed not only the fallibility of eyewitness identifications but also the unwitting tainting of witness memory through many standard eyewitness identification procedures.

A decade ago, the Department of Justice (DOJ) addressed the problem of misidentification in a technical working group, which sought to identify best practices supported by rigorous social science research. The National Institute of Justice, the research arm of the DOJ, formed the "Technical Working Group for Eyewitness Evidence," composed of membership from the scientific, legal and criminal justice communities, which recommended a series of protocols in a report and an attendant training manual.[13] Indeed, these recommendations are embodied in the provisions of H.B. 5273.

Since its publication, a number of bar associations, police groups, and state commissions have conducted more comprehensive consideration of these reforms. The American Bar Association's House of Delegates adopted Resolution 111C in 2004, a statement of Best Practices for Promoting Accuracy of Eyewitness Identification Procedures, which delineated general guidelines for administering lineups and photo arrays, and which, again, are largely reflected in H.B. 5273. In a report of the American Bar Association's Criminal Justice Section's Innocence Committee to Ensure the Integrity of the Criminal

[13] Technical Working Group for Eyewitness Evidence. (1999) *Eyewitness evidence: A Guide for Law Enforcement.* Washington, DC. United States Department of Justice, Office of Justice Programs; and Technical Working Group for Eyewitness Evidence. (2003) *Eyewitness evidence: A Trainer's Manual for Law Enforcement.* Washington, DC. United States Department of Justice, Office of Justice Programs.

Process, the ABA resolved that federal, state and local governments should be urged to adopt a series of principles consistent with those contained in its resolution, incorporating scientific advances in research that has been developed over time.

In 2006, the International Association of Chiefs of Police (IACP) published a "Training Key on Eyewitness Identification," which concludes that "of all investigative procedures employed by police in criminal cases, probably none is less reliable than the eyewitness identification. Erroneous identifications create more injustice and cause more suffering to innocent persons than perhaps any other aspect of police work. Proper precautions must be followed by officers if they are to use eyewitness identifications effectively and accurately." The IACP Training Key endorses a number of key reforms, including blind administration, recording the procedure, instructing the witness and obtaining a confidence statement.

Efforts to address misidentification have also taken place on the state level. In April 2001, New Jersey became the first state in the nation to officially adopt the NIJ recommendations when the Attorney General issued *Guidelines for Preparing and Conducting Photo and Live Lineup Identification Procedures*, mandating implementation of the recommendations – in addition to requiring that lineups be administered blind and presented sequentially – by all law enforcement agencies statewide. In May 2005, the Criminal Justice Standards Division of the North Carolina Department of Justice endorsed recommendations set forth in the North Carolina Actual Innocence Commission's report, *Recommendations for Eyewitness Identification*, which included "blind" and "sequential" lineups.[14] In September 2005, the Wisconsin Attorney General's Office followed New Jersey's lead and issued a similar set of policies for statewide use, *Model Policy and Procedure for Eyewitness Identification*, which

[14] North Carolina Department of Justice, Criminal Justice Standards Division. *Recommendations for Eyewitness Identification*, May 19, 2005.

also mandated the "blind-sequential" reform package.[15] In 2006, the California Commission on the Fair Administration of Justice, comprised of key criminal justice stakeholders from across the state of California, embraced a set of reforms in its Report and Recommendations Regarding Eye Witness Identification Procedures.[16] In 2007, the North Carolina legislature mandated the "blind-sequential" reform package when it passed HB 1625, perhaps the most comprehensive piece of eyewitness identification reform legislation to date.

Scientific Support for Eyewitness Reform

The large body of scientific research that supported these groundbreaking guidelines devised by NIJ's working group nearly a decade ago has only been bolstered by a significant amount of additional peer-reviewed study on every aspect of these reforms. Simply put, today there is solid research and experiential support for all of these reforms. I will now spend a few minutes reviewing the research reflected in the Report that prove the value of these reforms.

Blind Administration

We strongly support H.B. 5273's requirement that identification procedures be conducted double-blind, ensuring that the lineup administrator does not know which photograph or live lineup member being viewed by the eyewitness is the suspect. Over forty years of general social science research has demonstrated that test administrators' expectations are communicated either openly or indirectly to test subjects, who then modify their behavior in response.[17] A prominent meta-analysis conducted at Harvard University, which combined the findings of 345 previous studies, concluded that in the absence of a blind

[15] State of Wisconsin, Office of the Attorney General. *Model Policy and Procedure for Eyewitness Identification,* 2005.
[16] Please see http://ccfaj.org/documents/reports/eyewitness/official/eyewitnessidrep.pdf.
[17] e.g. Adair, J. G., & Epstein, J. S. (1968). Verbal cues in the mediation of experimenter bias. *Psychological Reports, 22,* 1045–1053; Aronson, E., Ellsworth, P. C., Carlsmith, J. M., & Gonzales, M. H. (1990). On the avoidance of bias. *Methods of Research in Social Psychology* (2nd ed., pp. 292–314). New York: McGraw-Hill.

administrator, individuals typically tailor their responses to meet the expectations of the administrator.[18]

Eyewitnesses themselves may seek clues from an identification procedure administrator. A recent experiment examining the decision-making processes of eyewitness test subjects concluded that, "witnesses were more likely to make decisions consistent with lineup administrator expectations when the level of contact between the administrator and the witness was high than when it was low."[19] The only way to avoid the influence of the administrator's expectations on the eyewitness is through the use of a blind administrator.

Advocating for the use of a blind administrator does not call into question the integrity of law enforcement; rather it acknowledges a fundamental principle of properly conducted experiments – that a person administering an experiment (or an eyewitness identification) should not have any predisposition about what the subject's response should be – and applies it to the eyewitness procedure. This eliminates the possibility – proven to exist in the eyewitness identification process – that a witness could seek, and an administrator might inadvertently provide, cues as to the expected response.

Consider the case of Thomas McGowan, who spent 23 years in the Texas prison system for a sexual assault he did not commit. DNA cleared him in April 2008, making him the 25th man from Texas (now 40) proven innocent through DNA testing after eyewitness misidentification led to a wrongful conviction. In this case, the crime victim looked through a stack of photographs and placed one of Mr. McGowan aside, indicating that she thought it was her assailant. The detective assigned to the case then told her, "You have to be sure, yes or no." The crime victim recalled the detective's instructions as follows:

[18] Rosenthal, R., & Rubin, D. B. (1978). Interpersonal expectancy effects: The first 345 studies. *Behavioral and Brain Sciences, 3*, 377-386.
[19] Haw, R. M. & Fisher, R. P. (2004). Effects of administrator-witness contact on eyewitness Identification accuracy. *Journal of Applied Psychology, 89*, 1106-1112.

> He said if I was going to say it was somebody, if I was going to say it was that picture, I had to be sure. He said I couldn't think it was him. He said I had to make a positive ID. I had to say yes or no.

It was at this point that the witness decided that McGowan was "definitely" the perpetrator of the crime. The McGowan case demonstrates that even when an officer is well-intentioned, his knowledge of the suspect's identity can easily push the witness into making a positive (but mistaken) identification and/or inflate the witness's confidence in a misidentification. Had the witness in the McGowan case paused on one of the non-suspect photographs, it is unlikely the detective would have been as forceful in attempting to elicit an identification or bolster the victim's level of confidence in the identification she made. Using a blind administrator ensures that the eyewitness, unlike the one in McGowan's case, will not be subject to the same well-intentioned pressure or provided with inadvertent verbal or non-verbal cues, the latter of which, while extremely influential, are particularly difficult to avoid when a non-blind administrator is conducting an identification procedure.

Some worry that double-blind administration is not feasible, potentially too expensive or resource-heavy, but this has not proven true in the field and, moreover, need not be the case. First, both large and small police departments that have progressed to using double-blind lineups, including those in New Jersey, North Carolina, Northampton, Denver, Dallas, Minneapolis- St. Paul, most of Wisconsin, etc., are doing so routinely without complaint, problems, or prohibitive expenses. The experience of these departments should quell concerns about the practicality of conducting blind lineups.

Second, jurisdictions that have been concerned about expending any additional manpower have implemented an alternative form of blind administration in which they "blind" the non-blind administrator. This can be done using a "folder shuffle method," as used in Wisconsin and Minnesota, as

well as through the use of laptop computers, as employed in Charlotte, NC.[20] Implementing blind administration carries the pricetag of ten manila folders, so those jurisdictions with limited manpower, unable to use a second administrator to perform an identification procedure, will not experience fiscal strains.

Instructing the Eyewitness

In addition to blind lineups, "cautionary instructions," or what we also call "witness warnings," are a key component of reform aimed at reducing the rate of mistaken identifications. Indeed, studies have demonstrated the dramatic decrease in mistaken identifications when witnesses understand that they are not required to identify someone at a lineup. *See* Nancy Steblay, *Social Influence in Eyewitness Recall: A Meta-Analytic Review of Lineup Instruction Effects*, 21 L. and Hum. Behav. 283 (1997) (finding a reduction in misidentifications when the culprit was not present from 78% to 33%, while still resulting in 87% identification of the culprit when the culprit was present). H.B. 5273 identifies what we believe to be the most important of these warnings – that the perpetrator may or may not be in the lineup and that the eyewitness should not feel compelled to make an identification – we would also suggest that H.B. 5273 also include the warning that "the investigation will continue whether or not an identification is made." These witness warnings have been adopted or recommended in part or entirely by North Carolina (House Bill 1625), West Virginia (Senate Bill 821), the American Bar Association, the New Jersey Attorney General, the California Commission on the Fair Administration of Justice, and the International Association of the Chiefs of Police (Training Key #600).[21]

Taken together with the additional instructions specifically alluded to in the H.B. 5273, these will deter

[20] Based on the best practices we have advocated for some time, the Innocence Project has included attached with this submission its recommended practices for "blinding" the administrator.
[21] The aforementioned NIJ Working Group on Eyewitness Evidence issued a set of recommended instructions, some of which have been referenced in our model best practices at the conclusion of this submission.

the eyewitness from feeling compelled to make a selection or seek clues or feedback from the administrator during the identification procedure about whom to pick or whether or not a selection was correct, and otherwise help minimize the likelihood of a misidentification. This "best practice" is generally accepted by law enforcement and easily administered.

Proper Composition of the Lineup

Clearly, the optimal composition of a lineup assures more accurate selections. Therefore, the Innocence Project supports H.B. 5273's recommendation that the fillers be selected for a live and/or photo lineups based on their similarity to the witness's description rather than on their resemblance to the suspect. As found by Gary Wells, "the match-description strategy is as effective as the resemble-suspect strategy at holding down false-identification rates. In addition, our results show that the match-description strategy is much better than the resemble-suspect strategy at promoting high rates of accurate identification. These results bolster the argument that selecting distractors who resemble a suspect can be detrimental to maintaining high accurate-identification rates." Wells, G.L., Rydell, S.M. and Seelau, E.P., *On the selection of distractors for eyewitness lineups*, 78 J. of Applied Psychol. 835 (1993).

In light of this research, the match-to-description basis for selecting lineup fillers has been recommended by the National Institute of Justice in both its *Eyewitness Evidence: A Guide for Law Enforcement* and *Eyewitness Evidence: A Trainer's Manual for Law Enforcement*, the New Jersey Attorney General's *Guidelines for Preparing and Conducting Photo and Live Lineup Identification Procedures*, the Wisconsin Department of Justice's *Model Policy and Procedure for Eyewitness Identification*, the California Commission On The Fair Administration Of Justice's *Report And Recommendations Regarding Eyewitness Identification Procedures*, and the American Bar Association's *Statement Of Best Practices For Promoting The Accuracy Of Eyewitness Identification Procedures*.

Consequently, as required by H.B. 5273, non-suspect photographs and/or live lineup fillers should be selected based on their resemblance to the description provided by the witness – as opposed to their resemblance to the police suspect – yet in such a way that the suspect does not unduly stand out from the fillers.

We also agree that no more than one suspect be placed in an identification procedure.

Obtaining a Confidence Statement

A significant body of peer-reviewed research clearly indicates that post-identification feedback to the eyewitness at the time the identification is made both artificially inflates the confidence of a witness in his or her identification and also contaminates the witness's memory of the event.[22] In other words, In addition to the danger of confidence inflation and false certainty, when post-identification confirming feedback is provided to an eyewitness who has incorrectly identified an innocent person, it can produce "strong effects" on witnesses' memory, including recollection of their opportunity to view the perpetrator and their degree of attention on the perpetrator.[23] This contaminating effect of confirming feedback, therefore, confounds the efforts of courts to assess the reliability of identification evidence, since it distorts and renders untrustworthy three of the five "reliability" factors enunciated in *Neil v. Biggers*, 409 U.S. 188 (1972) (a witness's degree of certainty, opportunity to view the perpetrator at the time of the incident, and degree of attention on the perpetrator). It also makes it difficult, if not impossible, for the jury to properly assess the witness's confidence at the time of the out-of-court confrontation, leaving it

[22] See, e.g., Bradfield, A. L., Wells, G. L., & Olson, E. A. (2002). The damaging effect of confirming feedback on the relation between eyewitness certainty and identification accuracy. *Journal of Applied Psychology, 87*, 112-120. and Wright, D. B., & Skagerberg, E. M. Post-identification feedback affects real eyewitnesses. *Psychological Science*, 18, 172-178 (2007).

[23] Wells, G.L., & Bradfield, A.L. (1998). "'Good, You Identified the Suspect': Feedback to Eyewitnesses Distorts Their Reports of the Witnessing Experience," *Journal of Applied Psychology*, 83, 360-376.

only with the witness's testimonial certainty months later. No one benefits in this situation – save for the real perpetrator, who becomes that much more sheltered from ever being identified, prosecuted, and convicted.

Given the corrupting effect of confirming feedback, documenting the witness's certainty, in his or her own words, immediately at the time of the identification, is critical, particularly in light of research that has consistently shown that the eyewitness's degree of confidence in his identification at trial is the single largest factor affecting whether jurors believe that the identification is accurate.[24] The more confidence the eyewitness exudes – irrespective of accuracy –, the more likely jurors will believe that the identification is accurate.

Therefore, we support H.B. 5273's requirement that immediately following the lineup procedure the eyewitness should provide a statement, in his or her own words, that articulates the level of confidence he or she has in the identification. Assessing a witness's level of certainty at the time of the identification is called for not only by social scientists,[25] but is consistent with the Supreme Court's dictates in *Manson v. Brathwaite*, 432 U.S. 98, 114 (1977) ("the factors to be considered ... include ... the level of certainty demonstrated at the confrontation").

Creating a Record of the Identification Procedure

As recognized by H.B. 5273, it is essential to document the entire identification procedure. While H.B. 5273 requires that the procedure be recorded in writing, there is nothing in H.B. 5273 that would prevent

[24] Bradfield, A. L. & Wells, G. L. (2000). The perceived validity of eyewitness identification testimony: A test of the five *Biggers* criteria, *Law and Human Behavior, 24*, 581-594 and Wells, G.L., Small, M., Penrod, S., Malpass, R.S., Fulero, S.M., & Brimacombe, C.A.E. (1998). Eyewitness identification procedures: Recommendations for lineups and photospreads, *Law and Human Behavior*, 22, 603-647. (Surveys and studies show that people believe strong relation exists between eyewitness confidence and accuracy).

[25] Douglass, A.B. & Steblay, N. (2006). Memory Distortion in Eyewitnesses: A Meta-Analysis of the Post-identification Feedback Effect. Applied Cognitive Psychology, 20, 859-869.

the police from using even more optimal recording techniques, such as video or audio. Documentation provides courts, prosecutors, defense lawyers, and jurors with the most complete access to the identification procedure, and is the most reliable account of any possible eyewitness identification. Moreover, in light of the potential hazard of inadvertent cues and confirming feedback discussed above, as well as the importance of assessing witness certainty contemporaneous with the identification, accurate and thorough recording of the procedure, including the precise verbal and non-verbal communications (captured most effectively when recorded by video) made by both the eyewitness and administrator, are indispensable.

It is worth noting that accurate recording enables documentation not only of suggestive elements of an identification procedure, but also of fair identification procedures conducted consistent with H.B. 5273's recommendations, thus helping to protect the police and prosecutors from potential allegations of unnecessary suggestion or unreliable procedures.

Given its importance, it is important that law enforcement document every step of the procedure and/or failure to preserve every photograph, array, and document used in an identification procedure. In fact, in recognition of the importance of recordation, the New Jersey Supreme Court recently held that as a condition to the admissibility of an out-of-court identification, law enforcement officers must make a written record detailing the out-of-court eyewitness identification procedure, including a verbatim account of any exchange between police and witnesses. *See State v. Delgado* 188 N.J. 48 (2006).

Finally, knowing that these types of procedures are being recorded boosts public confidence in the criminal justice process. Simply put, creating a thorough (and preferably electronic) record of eyewitness identification procedures provides everyone with the best evidence of what actually transpired during

those procedures. In addition, it is absolutely critical that the actual photographs from a photo lineup and photographic documentation of live lineup members are preserved.

Showups

While H.B. 5273 does not include a provision related to showup identification procedures – where an eyewitness is presented with a single suspect to see if the eyewitness identifies the individual as the perpetrator of the crime – we strongly encourage the Judiciary Committee to include a provision that would require law enforcement to follow the best practices as covered in the other provisions of H.B. 5273 when conducting showup identification procedures. Research has demonstrated that innocent suspects are at a greater risk in showups than in lineups, particularly (and not surprisingly) those who bear a resemblance to the actual perpetrator and/or are wearing similar clothing. Showups can be problematic because, as social scientists have argued, the format of an identification procedure should not directly communicate law enforcement's hypothesis of the perpetrator's identity to the eyewitness.[26] Further, an alternative format, such as a photo or live lineups, can rule out at least some incorrect identifications, while a show-up does not present the opportunity to identify any errors. Consequently, some criminal justice practitioners have concluded that the show-up procedure is inherently suggestive.[27]

Despite the intrinsic suggestiveness of the show-up procedure, there are occasions when it might be necessary for law enforcement. The show-up procedure can be useful for police officers who may lack the probable cause necessary for an arrest but believe the suspect, detained close in time and proximity to the incident, matches a general description of the perpetrator and should therefore participate in an identification procedure. While increasing the risk to innocent suspects of being mistakenly identified,

[26] G. Wells, G.L., Small, M. & Penrod, S. et al. (1998), *Eyewitness Identification Procedures: Recommendations for Lineups and Photospreads*, 22 Law & Human Behavior, 603, 619-20.
[27] *See State v. Dubose*, 699 N.W.2d 582, 592 (Wisc. 2005)(the Wisconsin Supreme Court ruled that show-up identification evidence is inadmissible unless, on the basis of the totality of the circumstances, it was shown to be necessary).

the show-up can also afford protection to innocent suspects who are not identified and thus may be immediately shielded from further suspicion, excluded as potential suspects, and protected from an otherwise humiliating arrest and investigation process.

It is critical, however, given the inherent suggestiveness of the show-up identification procedure format, that any perceived benefits be balanced against the inherent risks. Therefore, several safeguards should be built into all show-up procedures to minimize the deleterious effects of its format.[28] For instance, prior to the show-up procedure, the police should record the description of the perpetrator provided by the eyewitness and transport the witness to a neutral (i.e., non-law enforcement/not-crime scene location). During the show-up procedure, the police should provide a set of warnings to the eyewitness equivalent to those recommended by H.B. 5273 and by the Innocence Project in this testimony. The police should also take measures to minimize potentially damaging or prejudicial inferences that could be drawn about the suspect's guilt, including removing the suspect from the squad car, removing handcuffs before the arrival of the witness, and avoiding any words or conduct that may imply that the suspect is the perpetrator of the crime. The police should not conduct showups inclusive of more than one suspect or to more than one witness at a time. If one eyewitness makes a positive identification of the suspect, this should provide the police with sufficient probable cause to arrest the suspect, and thus each additional eyewitness should instead participate in either a photo or live line-up. Lastly, the police should document the show-up procedure (using video or audio recording if practicable), including the eyewitness's verbal reaction to the suspect presented and degree of certainty, in the eyewitness's own words, in his or her identification.

[28] These safeguards are derived from Wisconsin's Avery Task Force's "Eyewitness Identification Procedure Recommendations," which was based upon a comprehensive review and analysis of best practices, as well as from anecdotal recommendations and other existing research.

The Experiences of Those Jurisdictions that have Adopted Reforms

These changes have proven to be successful across the country. In the states of North Carolina and New Jersey, for instance, all jurisdictions were directed to promulgate their own policies and procedures for implementing these reforms, and, after an exhaustive review of research and practitioner experience, opted to implement the "blind-sequential" reform package. Both states reported that while there was initial resistance from many about the need for and value of such reforms, after police were provided the opportunity to learn more about them, receive training about how to properly implement them, and to participate in the formation of the specific adaptations of the reforms in their jurisdictions, those initial concerns have been replaced with acceptance of and appreciation for eyewitness identification procedures that increase the accuracy of criminal investigations and the effectiveness of criminal prosecutions and, by virtue of employing the most accurate eyewitness procedures available, strengthen the persuasive and probative value of eyewitness identifications before, during and after trial.[29]

In addition to New Jersey and North Carolina, large cities such as Minneapolis and St. Paul, MN and Milwaukee WI, medium-sized jurisdictions such as Santa Clara, CA, and Madison, WI, and small towns such as Northampton, MA have implemented best practices, including blind administration, and have found that they have improved their quality of their eyewitness identifications, strengthened prosecutions, and reduced the likelihood of convicting the innocent. Recently, the Dallas Police department joined the expanding list of "best practices" jurisdictions by electing to conduct its lineup procedures double-blind and sequentially.

We would be glad to put you in contact with persons involved with the implementation of these reforms

[29] The North Carolina initiative described above flowed from a working group led by their Chief Justice. It is worth noting, however, that the North Carolina Legislature chose to *require* the implementation of such reforms when – after the Duke Lacrosse case and other incidents – it became clear that guidelines were not enough.

in any of the aforementioned jurisdictions if you would like to speak with them about their experiences.

Conclusion

The strong body of peer-reviewed research, jurisdictional successes, a history of legislative action, and the support of national law enforcement and legal organizations for eyewitness identification reform all commend the public safety leadership that the Connecticut Legislature can provide with passage of H.B. 5273. Adoption of this bill will enhance Connecticut's ability to swiftly and surely convict offenders - and avoid being misled into pursuing others, or worse, convicting the innocent. Ultimately, implementation of eyewitness identification protocols identified in H.B. 5273 promises to serve the entire criminal justice community by serving the interests of law enforcement by helping to identify the guilty, promise the fair administration of justice by better protecting the innocent, and enhance the public safety.

Thank you for the opportunity to testify before you about this critically important reform. I would be glad to answer any questions.

INNOCENCE PROJECT

BLINDING THE ADMINISTRATOR:
How To Effect 'Blind' Administration of Eyewitness Procedures For Police Departments With Limited Manpower

To enhance the accuracy of any eyewitness identification procedure, the officer administering a lineup should not know which lineup member is the police suspect. Eyewitness identification procedures should therefore be conducted by a non-investigating, or 'blind,' administrator.

Understandably, small police departments with limited officer manpower – or larger departments with officers conducting identifications in the field - may believe that the requirement of 'blind administration' of eyewitness procedures is unfeasible. Yet this need not be the case at all.

Workable solutions have emerged to address this concern. Law enforcement agencies that have implemented this reform report that they are able to 'blind' the administrator without expending additional manpower resources. This is done through the time-tested 'folder system' or by means of emerging laptop technology.

THE FOLDER SYSTEM

The "Folder System" was devised to address concerns surrounding limited resources while allowing for blind administration. Should the investigating officer of a particular case be the only law enforcement personnel available to conduct a photo lineup, the following instructions are recommended:

1. Use one suspect photograph that resembles the description of the perpetrator provided by the witness, five filler photographs that match the description but do not cause the suspect photograph to unduly stand out, and ten folders [four of the folders will not contain any photos and will serve as 'dummy folders'].

2. Affix one filler photo to Folder #1 and number the folder.

3. The individual administering the lineup should place the suspect photograph and the other four filler photographs into Folders #2-6 and shuffle the photographs so that he is unaware of which folder the suspect is in, and then number the remaining folders, including Folders #7-10, which will remain empty. [This is done so that the witness does not know when he has seen the last photo].

4. The administrator should provide instructions to the witness. The witness should be informed that the perpetrator may or may not be contained in the photos he is about to see and that the administrator does not know which folder contains the suspect.

5. Without looking at the photo in the folder, the administrator is to hand each folder to

the witness individually. Each time the witness has viewed a folder, the witness should indicate whether or not this is the person the witness saw and the degree of confidence in this identification, and return the photo to the administrator. The order of the photos should be preserved, in a facedown position, in order to document in Step 6.

6. The administrator should then document and record the results of the procedure. This should include: the date, time and location of the lineup procedure; the name of the administrator; the names of all of the individuals present during the lineup; the number of photos shown; copies of the photographs themselves; the order in which the folders were presented; the sources of all of the photos that were used; a statement of confidence *in the witness's own words* as to the certainty of his identification, taken immediately upon reaction to viewing; and any additional information the administrator deems pertinent to the procedure.

* The information described above was informed by "Eyewitness Identification Procedure Recommendations" put forth by Wisconsin's Avery Task Force as well as existing research on the folder shuffle.

LAPTOP TECHNOLOGY

A number of software companies have begun to develop technologically advanced software for law enforcement agencies that allow for computer-based identification procedures. In addition to assuring blind administration through laptop technology, some of these companies have also ensured that their programs incorporate many of the reforms that are endorsed or urged by the National Institute of Justice and the American Bar Association, including: the provision of witness instructions and confidence statements; the proper generation of fillers based on the witness's description; and the recordation of the procedure from start to finish.

Police departments in Charlotte and Winston-Salem, North Carolina, have already begun to use one such application, and other law enforcement agencies are exploring the option in an attempt to streamline their procedures, while ensuring that safeguards to the innocent are in place.

Updating Connecticut's Eyewitness Identification Procedures

Eyewitness misidentification is the single largest cause of wrongful conviction.

In 75% of the nation's 251 DNA exonerations, eyewitness misidentification was a factor. **Updating eyewitness identification protocols is the single most important reform Connecticut can implement to prevent wrongful conviction.**

At the Innocence Project, we promote the use of updated eyewitness identification procedures. Front-end opposition is not uncommon, although following implementation, not one jurisdiction has reversed its policy. We prepared this document to demonstrate to policymakers that resistance is not uncommon, nor is the substance of the concerns about such legislation. What follows is a set of responses to those apprehensions and contentions typically voiced by those considering these reforms around the country:

Contention:

- Other states/jurisdictions have not implemented the reforms put forward in this bill.

Response:

- This is patently false. Not only have several states implemented the very reforms put forth in this legislation, from New Jersey to North Carolina, several police and legal groups have issues recommendations advocating the same. We have attached a lengthy document that details implementation around the nation.

Contention:

- A "field study" that was conducted in Illinois undercuts the validity of the best practices offered in this legislation.

Response:

- A peer-reviewed publication (attached) disseminated the findings of a blue ribbon panel, composed of leading social science researchers and including a Nobel Laureate, which concluded that the methodology employed by the Illinois Report evaluators rendered its conclusions unreliable.

- We have also attached a document that provides further discussion of the Illinois Report. Upon request, we are happy to provide you with additional responses from the scientific community, as well a refutation of the report's findings by the Wisconsin's AG's Office.

- On the other hand, the updated protocols recommended in this legislation are based upon more than 25 years of social science research, much of which can be made available upon request.

Contention:

- Connecticut would be the first jurisdiction in the nation to use the folder shuffle method.

Response:

- The state of North Carolina passed a law which, like SB 77, mandates the blind administration of lineups. It explicitly allows for the use of the "folder shuffle" method in order to assist small

law enforcement agencies that are unable to use a blind administrator because of manpower limitations:

N.C.G.S.A. § 15A-284.52:
Alternative Methods for Identification if Independent Administrator Is Not Used. – In lieu of using an independent administrator, a photo lineup eyewitness identification procedure may be conducted using an alternative method specified and approved by the North Carolina Criminal Justice Education and Training Standards Commission. Any alternative method shall be carefully structured to achieve neutral administration and to prevent the administrator from knowing which photograph is being presented to the eyewitness during the identification procedure. Alternative methods may include any of the following:
(1) Automated computer programs that can automatically administer the photo lineup directly to an eyewitness and prevent the administrator from seeing which photo the witness is viewing until after the procedure is completed.
(2) *A procedure in which photographs are placed in folders, randomly numbered, and shuffled and then presented to an eyewitness such that the administrator cannot see or track which photograph is being presented to the witness until after the procedure is completed.*

- Four years ago, **the Wisconsin Attorney General** adopted model policies on eyewitness ID that expressly adopted the folder method as an acceptable method for conducting "blind" procedures, excerpted below:

In some situations, it may be difficult to have an independent administrator conduct the array. In those situations, the investigating officer may conduct the array, but only with safeguards to ensure that he/she is not in a position to unintentionally influence the witness's selection. Departments are encouraged to come up with their own methods for meeting this recommendation. One option is to use a computer to randomly present the photos to the witness out of view of the investigator. A simpler and less expensive alternative is the folder system, described below.

- Jurisdictions large and small across the country employ the folder shuffle method, from Northampton, MA to St. Paul, MN (these reforms were recently highlighted in Police Chief magazine).

Contention:
- This will cost money.

Response:
- There are minimal costs, i.e. training costs. The 10 minute video that shows how to perform the folder shuffle method is available for free on DVD or on the Internet.

- The folder shuffle method is virtually cost-free. Using standard office supplies, it carries a pricetag of the cost of ten manila folders.

Contention:
- Passing this law will "freeze in time" best practices relating to eyewitness identification, making it harder to adopt new breakthroughs in the future.

Response:
- The updated reforms included in this legislation represent the consensus of the scientific community regarding the best – and most valuable – practices in the area of eyewitness identification. These recommended practices flow from thirty years of social science research.

- To date, law enforcement agencies in Connecticut have not implemented those best practices already supported by a quarter century of research. *This is precisely why legislation in this area is vital.* We encourage law enforcement to implement any additional best practices that are identified in the future and passage of this law will not prevent them from doing so.

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RESPONSES OF VARIOUS COMMUNITIES TO SCIENTIFIC FINDINGS ON EYEWITNESS IDENTIFICATION

MARCH, 2010

COMMITTEES AND TASK FORCES

In response to the outpouring of eyewitness identification research and the growing number of wrongful convictions caused by mistaken identification, the scientific, legal, and law enforcement communities have organized working groups and task forces to study the issue and, relying on the scientific findings, devised procedures to ameliorate the problem.

FEDERAL

1. Nat'l Inst. of Justice, U.S. Dep't of Justice, Convicted by Juries, Exonerated by Science: Case Studies in the Use of DNA Evidence to Establish Innocence After Trial (1996).

   In 1996, then-Attorney General Janet Reno, through the National Institute of Justice (NIJ), a research and development arm of the Department of Justice, appointed a Technical Working Group on Eyewitness Evidence to establish national guidelines for law enforcement regarding the best ways to collect and preserve eyewitness identification evidence. The group included numerous law enforcement officers from across the nation, prosecutors, defense attorneys (including James Doyle), and social scientists (including Gary Wells and Roy Malpass).

2. Nat'l Inst. of Justice, U.S. Dep't of Justice, Eyewitness Evidence: A Guide for Law Enforcement (1999); Nat'l Inst. of Justice, U.S. Dep't of Justice, Eyewitness Evidence: A Trainer's Manual for Law Enforcement (2003).

   In 1999, as a result of the work of the Technical Working Group on Eyewitness Evidence, the NIJ published a set of best practice recommendations for law enforcement nationwide. The Guide was followed in 2003 by the Training Manual. Upon their release, both the Guide and the Manual were mailed to law enforcement agencies nationwide. Dr. Wells co-chaired the Eyewitness Identification Police Training Manual Writing Committee, which prepared all of the materials for the training manual.

AMERICAN BAR ASSOCIATION

3. Am. Bar Ass'n, Adopted by the House of Delegates (2004); Ad Hoc Innocence Comm. to Ensure the Integrity of the Criminal Process, Am. Bar Ass'n, Achieving Justice: Freeing the Innocent, Convicting the Guilty (2006).

   In 2004, the American Bar Association's House of Delegates adopted its Statement of Best Practices for Promoting the Accuracy of Eyewitness Identification Procedures, which delineated general guidelines for administering lineups and photo arrays. In a report of the American Bar Association's Criminal Justice Section's Ad Hoc Innocence Committee to Ensure the Integrity of the Criminal Process, the ABA resolved that federal, state and local governments should be urged to adopt a series of principles consistent with those contained in its resolution, incorporating scientific advances in research that has been developed over time.

NEW JERSEY

4. Office of the Attorney Gen., N.J. Dep't of Law and Pub. Safety, Attorney General Guidelines for Preparing and Conducting Photo and Live Lineup Identification Procedures (2001).

   In April 2001, New Jersey became the first state in the nation to officially adopt the NIJ recommendations when the Attorney General issued the Guidelines, mandating implementation of the

recommendations – in addition to requiring that lineups be administered blind and presented sequentially – by all law enforcement agencies statewide.

ILLINOIS

5. Governor's Comm'n on Capital Punishment, State of Ill., Report of the Governor's Commission on Capital Punishment (2002).

   In 2000, then-Governor George Ryan established the Commission on Capital Punishment to study and review the administration of capital punishment in Illinois. In April 2002, the Commission published its Report of the Governor's Commission on Capital Punishment, which included reforms to eyewitness identification procedures, including double-blind and sequential procedures, and warning witnesses that the perpetrator might not be in the lineup or photo array and that they should not feel compelled to make an identification. In 2003, the Death Penalty Reform Bill was enacted, providing that witnesses be warned that the suspect may not be in the lineup.

NORTH CAROLINA

6. N.C. Actual Innocence Comm'n, Recommendations for Eyewitness Identification (2003).

   In November 2002, then-Chief Justice I. Beverly Lake of the North Carolina Supreme Court established the North Carolina Actual Innocence Commission to study causation issues in wrongful convictions and recommend potential strategies to substantially lessen their incidence. In October 2003, the North Carolina Actual Innocence Commission released its recommendations for eyewitness identification in North Carolina, which included blind administration. ***These recommendations became statutory law for the State of North Carolina in March 2008.***

INNOCENCE PROJECT

MASSACHUSETTS

7. District Attorney's Office, Suffolk County, Report of the Task Force on Eyewitness Evidence (2004).

   In 2004, the Boston Police Department and the Suffolk County District Attorney's Office formed the Boston Police Department Task Force on Eyewitness Evidence to reform the country's eyewitness identification procedures. The task force produced a set of guidelines – now followed by the county, including Boston – on how to obtain and preserve eyewitness identification evidence, which included double-blind and sequential administration and admonitions to witnesses prior to an identification procedure.

8. Boston Bar Assoc. Task Force, Boston Bar Assoc., Getting It Right: Improving the Accuracy and Reliability of the Criminal Justice System in Massachusetts (2009).

   The Boston Bar Association (BBA) Task Force was charged with identifying reforms needed to reduce the risk of convicting innocent people and recommending how those reforms should be implemented. The Task Force was comprised of three committees, one of which focused upon potential reforms in the areas of Eyewitness Identifications and Suspect/Witness Interviews. That committee included the Boston Police Commissioner, the Suffolk County First Assistant District Attorney, a Massachusetts State Police Major, and the Boston Police Deputy Superintendent. In December 2009, the Task Force issued recommendations it believed would substantially reduce the risk of convicting the innocent and increase the accuracy of the criminal justice system.

WISCONSIN

9. Office of the Attorney Gen., Wis. Dep't of Justice, Model Policy and Procedure for Eyewitness Identification (2005).

   In 2005, the Wisconsin Attorney General's Office followed New Jersey's lead and issued a similar set of policies for statewide use, Model Policy and Procedure for Eyewitness Identification, which also mandated the "blind-sequential" reform package.

INNOCENCE PROJECT

CALIFORNIA

10. Cal. Comm'n on the Fair Admin. of Justice, Report and Recommendations Regarding Eyewitness Identification Procedures (2006).

In 2006, the California Commission on the Fair Administration of Justice, comprised of key criminal justice stakeholders from across the state of California, embraced a set of reforms in its Report and Recommendations Regarding Eye Witness Identification Procedures. The report offered numerous recommendations and/or reforms, including double-blind and sequential identification procedures, videotaping or audiotaping lineup procedures and photo displays, providing cautionary instructions to witnesses (the suspect may or may not be present in the procedure and that neither an identification or non-identification will end the investigation), documenting witnesses' statements of certainty, and not providing any confirming feedback to witnesses prior to obtaining witnesses' certainty assessments.

NEW YORK

11. Task Force on Wrongful Convictions, N.Y. State Bar Ass'n, Final Report of the New York State Bar Association's Task Force on Wrongful Convictions (2009).

In 2008, the New York State Bar Association formed the Task Force on Wrongful Convictions to study the root causes of wrongful convictions in New York and to promulgate any changes necessary to prevent wrongful convictions. The Task Force is comprised of some of New York's top judges, prosecutors, defense counsel, legal scholars and experts in the field of criminal justice. In 2009, the Task Force issued its Final Report, which included a lengthy section on Eyewitness Identification, proposing the adoption of double-blind administration, cautioning witnesses that the perpetrator may or may not be present, choosing fillers who fit the witnesses' descriptions of the perpetrator, and recording witnesses' assessments of certainty.

AMERICAN PSYCHOLOGY/LAW SOCIETY

12. Gary L. Wells et al., Eyewitness Identification Procedures: Recommendations for Lineups and Photospreads, 22 Law & Hum. Behav. 603 (1998).

In 1996, the Executive Committee of the American Psychology/Law Society created a subcommittee to review contemporary scientific research on eyewitness identification and to use those empirical findings to make recommendations for improving the reliability of identification evidence. This collaboration resulted in the first "White Paper" ever published by the American Psychology-Law Society.

LAW ENFORCEMENT/PROSECUTING AGENCIES

INTERNATIONAL ASSOCIATION OF CHIEFS OF POLICE

13. Int'l Ass'n of Chiefs of Police, Training Key No. 600, Eyewitness Identification (2006).

In 2006, the International Association of Chiefs of Police (IACP) published a Training Key on Eyewitness Identification, which concluded that "of all investigative procedures employed by police in criminal cases, probably none is less reliable than the eyewitness identification. Erroneous identifications create more injustice and cause more suffering to innocent persons than perhaps any other aspect of police work. Proper precautions must be followed by officers if they are to use eyewitness identifications effectively and accurately." The IACP Training Key endorses a number of key reforms, including blind administration, recording the procedure, instructing the witness and obtaining a confidence statement.

POLICE EXECUTIVE RESEARCH FORUM

14. James M. Cronin et al., Promoting Effective Homicide Investigations (2007).

Incorporated in 1977, the Police Executive Research Forum (PERF) is a

national membership organization of police executives from the largest city, county and state law enforcement agencies, dedicated to improving policing and advancing professionalism through research and involvement in public policy debate. This report, which emerged from two PERF conferences on crime reduction, sought to improve homicide investigations by exploring law enforcement agency practices as well as new procedures to promote more effective investigations. Chapter Four is devoted to the issue of eyewitness identification procedures, recommending double-blind and sequential lineup administration, warning witnesses prior to the identification procedure that the perpetrator may or may not be present, selecting fillers who fit witnesses' descriptions of the perpetrator, documenting witnesses' statements of certainty, and recording with specificity the outcome of the identification procedure, including non-identifications and identifications of fillers.

COMMISSION ON THE ACCREDITATION OF LAW ENFORCEMENT AGENCIES

15. Stephen Saloom, Improving Eyewitness Identification Procedures, CALEA Update (Comm'n on Accreditation for Law Enforcement Agencies, Fairfax, Va.), Oct. 2003, at 26.

In 2009, the Commission on the Accreditation of Law Enforcement Agencies (CALEA), a credentialing authority created by the IACP, National Organization of Black Law Enforcement Executives, National Sheriffs' Association, and PERF, adopted eyewitness identification standards 42.2.11 and 42.2.12, which require agencies seeking accreditation to create written procedures for conducting eyewitness lineup and showup procedures which would address, among other issues, filler selection, lineup instructions to witnesses, complete recordation and documentation of the procedure, including witnesses' confidence statements, and avoiding giving confirming feedback to witnesses. Stephen Saloom, Policy Director at the Innocence Project, wrote an article in CALEA's October 2009 newsletter about the CALEA-Innocence Project collaboration on eyewitness identification reform.

INNOCENCE PROJECT

NORTHAMPTON, MA

16. Ken Patenaude, Improving Eyewitness Identification, Law Enforcement Tech., Oct. 2003, at 178; Kenneth Patenaude, Police Identification Procedures: A Time for Change, 4 Cardozo Pub. L. Pol'y & Ethics J. 415 (2006).

    Ken Patenaude, Captain of the Northampton Police Department (now retired), was an outspoken proponent of improving identification procedures in light of developments in social science research. Capt. Patenaude (then-Detective Lieutenant) was a member of the National Institute of Justice's Technical Working Group for Eyewitness Evidence, which authored Eyewitness Evidence: A Guide for Law Enforcement in 1999.

17. Northampton Police Dep't, Administration & Operations Manual ch. O-408 (2005).

    Under Capt. Patenaude's leadership, the Northampton Police Department adopted enhanced identification procedures, requiring double-blind and sequential administration, warnings to witnesses prior to identification procedures (including "The person who committed the crime may or may not be in the lineup being presented," "It is just as important to clear innocent persons from suspicion as to identify guilty parties," and "regardless of whether an identification is made, the police will continue to investigate the incident"), selecting fillers who match the witnesses' descriptions, recording witnesses' certainty assessments in the witnesses' own words, and documenting any non-identifications.

ST. PAUL AND MINNEAPOLIS, MN

18. Amy Klobuchar & Hilary Lindell Caligiuri, Protecting the Innocent/Convicting the Guilty: Hennepin County's Pilot Project in Blind Sequential Eyewitness Identification, 32 Wm. Mitchell L. Rev. 1 (2005); Amy Klobuchar et al., Improving Eyewitness Identifications: Hennepin County's Blind Sequential Lineup Pilot Project, 4 Cardozo Pub. Pol'y & Ethics J. 381 (2006).

    Amy Klobuchar, now a United States Senator representing Minnesota,

was the Hennepin County Attorney from 1998 to 2006 and served as a president of the Minnesota County Attorneys Association. Under Klobuchar's directive, in 2003 the Hennepin County Attorney's Office improved its eyewitness identification procedures by adopting a new lineup protocol it believed would minimize the risk of mistaken identifications. Included in these procedures were double-blind and sequential presentation, warnings to witnesses that the perpetrator may or may not be in the lineup, the documentation of witness confidence statements, and improved lineup composition. After instituting its enhanced procedures, Hennepin County partnered with Dr. Nancy Steblay on a pilot project to assess their efficacy as compared with the standard non-blind, simultaneous procedures. These two publications, co-authored by Klobechar, describe Hennepin County's procedures and participation in the pilot project. Klobechar concludes that the new procedures "will help improve police investigations, strengthen prosecutions and better protect the rights of innocent people while convicting those who are guilty."

19. Susan Gaertner & John Harrington, Successful Eyewitness Identification Reform: Ramsey County's Blind Sequential Lineup Protocol, Police Chief, Apr. 2009, at 130.

After a DNA exoneration in a 2002 rape case in which the conviction rested in part on eyewitness identification evidence, Ramsey County sought to reform, among other things, its eyewitness identification procedures. After reviewing the social scientific research, as well as other "best practices" embraced throughout the country, Ramsey County adopted double-blind and sequential lineup procedures. Like Hennepin County, Ramsey County adopted new procedures and participated in a pilot project comparing the procedures with the earlier non-blind and simultaneous formats. Susan Gaertner, Ramsey County Attorney, spearheaded these efforts, and recently published this article in Police Chief endorsing the double-blind procedures. As she writes, "investigators who used [double-blind and sequential procedures] found it ... workable .... There were no associated administrative difficulties or additional overtime costs. However, there was an unexpected benefit: most investigators involved in the pilot came to prefer the new method and felt more confident in the eyewitness identifications that resulted. ... No one felt that appreciably fewer identifications had been made. ... Most investigators ended up preferring to use ... an independent

administrator."

20. Improving Eyewitness Identification Procedures: Bringing Together the Best in Science, Technology and Practice (St. Paul, Minn., Oct. 26, 2009).

This conference was presented by the Office of the Ramsey County Attorney, the Minnesota Bureau of Criminal Apprehension, and the Minnesota County Attorneys for law enforcement professionals to provide practical, policy, and scientific perspectives on the existence and implementation of improved eyewitness identification procedures in Minnesota.

SANTA CLARA, CA

21. Police Chiefs' Ass'n of Santa Clara County, Line-up Protocol for Law Enforcement (2002).

In 2002, the Police Chiefs' Association of Santa Clara County amended its lineup procedures, calling for double-blind and sequential administration, warnings to witnesses prior to identification procedures (including "The person who committed the crime may or may not be shown," "It is just as important to clear innocent persons from suspicion as it is to identify guilty parties," and "regardless of whether an identification is made, the police will continue to investigate the incident"), recording witnesses' certainty assessments in the witnesses' own words, and documenting any non-identifications.

DENVER, CO

22. Denver Police Dep't, Operations Manual § 104.44 (2006); Denver Police Dep't, Photographic Lineup Admonition/Photo Identification Report (2009).

In 2006, the Denver Police Department issued lineup procedures calling for double-blind and sequential administration, warnings to witnesses prior to identification procedures (including the person who committed the crime "may or may not" be the person shown and that the investigation will continue regardless of whether an identification is

made), and documentation of any non-identifications.

DALLAS, TX

23. Dallas Police Dep't, Dallas Police Department General Order § 304.01 (2009); Dallas Police Acad., Roll Call Training Bulletin No. 2009-04, Blind Sequential Photographic Line-up (2009); Dallas Police Dep't, Photographic Line-up Admonition Form (n.d.); Dallas Police Acad., Roll Call Training Bulletin No. 2008-27, One Person Show-up (2008).

    There have been more DNA exonerations in Dallas County than in any other county in the United States. In 2009, in an effort to curb wrongful convictions, the Dallas Police Department reformed its identification procedures to require double-blind and sequential administration, warnings to witnesses prior to identification procedures (including "The person who committed the crime may or may not be included" and "The investigation will continue whether or not you make any identification"), selecting fillers who match the witnesses' descriptions, and recording witnesses' certainty assessments in the witnesses' own words. The Dallas Police Department also adopted new showup procedures in 2008, which included requiring warnings to the witness that the person shown may or may not be the perpetrator, prohibiting multiple showups in cases involving multiple witnesses after one witness makes an identification from a showup, requiring the police to obtain a detailed description from the witness prior to the identification procedures, ensuring that the suspect fit the witness's detailed description, and requiring law enforcement to avoid making suggestive statements to witnesses.

LEGISLATION

NORTH CAROLINA

24. N.C. Gen Stat. § 15A-284.52 (2007).

    Mandates blind administration, specific instructions to the witness, appropriate filler selection, obtaining confidence statements, sequential presentation, recording the procedure when practicable, and necessary training. The legislation also articulates legal remedies for law

enforcement's noncompliance with the statute.

WISCONSIN

25. Wis. Stat. § 175.50 (2007-08) (enacted 2005).

Requires law enforcement agencies to adopt written policies for eyewitness identification, designed to reduce the possibility of wrongful conviction. The state Attorney General's office offers a series of best practices for agencies to follow, including blind administration, specific instructions to the witness, appropriate filler photo usage, obtaining a confidence statement from witnesses, and sequential presentation.

WEST VIRGINIA

26. W. Va. Code § 62-1E-1 to -3 (2008) (enacted 2007).

Mandates several key reforms, including providing lineup instructions to witnesses, obtaining confidence statements, and creating a written record of the entire procedure, and created a task force to study and identify additional best practices for eyewitness identification.

MARYLAND

27. Md. Code Ann., Pub. Safety § 3-506 (LexisNexis 2009) (enacted 2007).

Requires each law enforcement agency in the state to adopt written policies related to eyewitness identification. The bill did not expressly set standards to be included in the policies; however, it did state that the policies should "comply with the United States Department of Justice standards on obtaining accurate eyewitness identification."

ILLINOIS

28. 725 Ill. Comp. Stat. Ann. 5/107A-5 (West 2009) (enacted 2003).

Requires all lineups to be photographed or otherwise recorded, all eyewitnesses to sign a form acknowledging that the suspect may not be in the lineup, that they are not obligated to make an identification, and

that they should not assume that the administrator knows which photograph is that of the suspect, and that suspects appearing in the lineup should not appear substantially different from fillers in the lineup or photo array, based on the eyewitness' previous description of the perpetrator, or based on other factors that would draw attention to the suspect.

GEORGIA

29. H.R. 352, 149th Gen. Assem., Reg. Sess. (Ga. 2007); Ga. Police Acad., Ga. Pub. Safety Training Ctr., Witness Identification Accuracy Enhancement Act: Participant Guide (2008).

Created a study committee comprised of five members of the House of Representatives to be appointed by the Speaker. The purpose of the committee was to study best practices for eyewitness identification procedures and evidentiary standards for admissibility of eyewitness identifications. Though the committee failed to recommend further legislation, the Georgia Peace Officers Standards and Training Council instituted statewide training which includes blind administration.

VERMONT

30. 2007-60 Vt. Adv. Legis. Serv. (LexisNexis).

SB 6 established a committee for the purpose of studying best practices relating to eyewitness identification procedures and audio and audiovisual recording of custodial interrogations. The issues under consideration include: studying federal and state models and developing best practices; determining whether other statewide policies on these issues should be adopted in Vermont; and studying current policies in local jurisdictions and whether these policies are consistent with one another and with relevant statewide policies.

INNOCENCE PROJECT

Benjamin N. Cardozo School of Law, Yeshiva University

RESPONSE TO THE ILLINOIS PILOT PROGRAM REPORT

ILLINOIS "EXPERIMENT" WAS NOT SCIENTIFICALLY CONDUCTED; THEREFORE IT IS NOT A RELIABLE PREDICTOR OF THE DOUBLE-BLIND SEQUENTIAL PROCEDURE'S VALIDITY OR EFFECTIVENESS

- A recent peer-reviewed publication disseminated the findings of a blue ribbon panel, composed of leading social science researchers and including a Nobel Laureate, which concluded that the methodology employed by the Illinois Report evaluators rendered its conclusions unreliable: ***"The confound (failing to properly isolate the variables) has devastating consequences for assessing the real world implications of this particular study"*** and that, therefore, ***"(t)he results to not inform everyday practice in a useful manner."*** [1]

- A host of social science researchers and practitioners have, from the beginning, questioned the Report's assertions, assumptions, and methodology, indicating that the Report's flaws undercut the reliability and validity of results necessary to raise legitimate questions about sequential presentation.[2]

"CONFOUND" IN ILLINOIS EXPERIMENT CAUSE INCONGRUITY WITH EXISTING SCIENTIFIC FINDINGS AND OTHER JURISDICTIONS' EXPERIENCES

- Nearly the entire body of existing research consistently supports the effectiveness of the double-blind sequential procedure in decreasing false identifications.[3]

- An analysis of a pilot program in Hennepin County, Minnesota, which includes Minneapolis and other suburban communities, that also tested the effectiveness of a double-blind sequential lineup concluded, "the Hennepin County pilot project substantially decreased the rate of false identification, yet maintained an effective rate of suspect identification."[4]

DEBATE OVER SEQUENTIAL PRESENTATION DOES NOT EXTEND TO OTHER EYEWITNESS IDENTIFICATION REFORMS

While the Illinois Report sought to question the validity of the sequential presentation, it did not raise questions about the value of the traditional eyewitness identification reform package, which includes:

- Blind administration[5]
- Instructions to the witness, including the directive that the perpetrator may not be present[6]
- Eliminating confirming feedback once an identification is made[7]
- Obtaining a statement from the witness, indicating his level of confidence in the identification[8]

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- Choosing fillers that match the description provided by the filler and do not unduly stand out[9]

DESPITE ILLINOIS, STATES STILL RAPIDLY ADOPTING REFORMS

In 2007 alone, Georgia, Maryland, North Carolina, California, Vermont and West Virginia passed legislation to change the eyewitness identification procedures in their state or set up a statewide commission to study the issue of eyewitness identification. During the 2007 legislative session, 16 states[10] introduced eyewitness identification reform legislation that included elements of the larger package of reforms.

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[1] Schacter, D., et. al. (2007). Policy Reform: Studying Eyewitness Investigations in the Field. *Law and Human Behavior.*

[2] e.g. Steblay, N. http://web.augsburg.edu/%7Esteblay/ObservationsOnTheIllinoisData.pdf; Wells, G. http://www.psychology.iastate.edu/FACULTY/gwells/Illinois_Project_Wells_comments.pdf; Response from the Wisconsin Attorney General: http://www.doj.state.wi.us/dles/tns/ILRptResponse.pdf. See also: Timothy P. O'Toole, What's the Matter With Illinois? How an Opportunity was Squandered to Conduct an Important Study on Eyewitness Identification Procedures, *The Champion*, August, 2006.

[3] Notably, a meta-analysis, which collapsed the results of twenty-three papers that comprised 4,145 participants, showed that the rejection of the innocent occurred at a significantly higher rate in a sequential lineup compared to a simultaneous one. (Steblay, N. Jennifer Dysart, Solomon Fulero, R. C. L. Lindsay. (2001). "Eyewitness Accuracy Rates in Sequential and Simultaneous Lineup Presentations: A Meta-Analytic Comparison," Law and Human Behavior, 25, 459-473).
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ORIGINAL ARTICLE

Policy Forum: Studying Eyewitness Investigations in the Field

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Abstract This article considers methodological issues arising from recent efforts to provide field tests of eyewitness identification procedures. We focus in particular on a field study (Mecklenburg 2006) that examined the "double blind, sequential" technique, and consider the implications of an acknowledged methodological confound in the study. We explain why the confound has severe consequences for assessing the real-world implications of this study.

Keywords Eyewitness identification · Double blind sequential procedure · Field studies

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One of the most interesting products of the first wave of wrongful convictions exposed by DNA has been a vigorous debate over potential changes in the design and execution of the lineups and photographic arrays, familiar to every television viewer, that police rely on to probe memory in eyewitness cases, the category that dominates the exoneration lists. All of the current proposals for change in investigative practice derive from extensive laboratory inquiry, and they have at their cores the novel "double-blind, sequential" technique for conducting eyewitness identification procedures. In this technique the law enforcement personnel conducting an identification procedure are "blind" concerning which person in the lineup or photo array is the police suspect, and they present the "fillers" and the suspect to the witness individually ("sequentially") rather than in a group ("simultaneously"), as in the traditional practice. The changes from current procedure are designed to ensure that witnesses discern no inadvertent cues as to which individual they should or should not identify, to encourage witnesses to compare each individual they see to the remembered image of the criminal (rather than to make a relative, "looks-most-like," judgment comparing the individuals displayed to each other), and to eliminate unnecessary "feedback" to witnesses who have made a selection and might look to the lineup administrator for confirmation or contradiction.

Everyone agrees that proposed changes in investigative practice should be tested in the field, but moving from the

laboratory to the field has always been problematic. The proper design of field studies used to evaluate new procedures in the field has become an important issue. Two recent efforts at field-testing the "double-blind, sequential" option have taken place. The first, conducted by several departments in Hennepin County, Minnesota, produced results consistent with those predicted by the laboratory scientists, but made no explicit comparison to traditional practices, and it has not been controversial. (Klobuchar et al. 2006). The second field study, conducted in three Illinois jurisdictions under the direction of the general counsel for the Chicago Police, Sheri Mecklenburg, and documented at length in a report (usually referred to as "The Mecklenburg Report," after its author) appeared to contradict both the laboratory scientists' predictions and the sparse existing field data on eyewitness performance (Mecklenburg 2006). The Mecklenburg report stated that in two of the three jurisdictions reporting, the traditional method of an aware, "not-blind" detective displaying the suspect and "fillers" in a group to the witness produced a lower rate of identifications of innocent fillers and a higher rate of identifications of suspects than did the lab-generated "double-blind, sequential" technique. The recommendation of the Mecklenburg Report, in other words, was that the system should not institute changes on the basis of the laboratory science. The Mecklenburg Report was vigorously publicized, and it immediately drew both determined support and sharp criticism from psychologists who had long been interested in the issue of eyewitness investigative procedures.

Unfortunately for criminal justice practitioners who must decide whether procedures should be changed, the early scientific commentaries on the Mecklenburg Report generally aligned with the views on the potential of these particular procedural innovations that the commentators had announced throughout their long careers of involvement with the issue of eyewitness memory. Seizing on this, partisans on both sides of the debate over procedures have unfairly dismissed some criticism and praise of the Mecklenburg Report as reflecting nothing more than the scientific commentators' stubborn loyalty to their own pre-existing beliefs. A standoff has arisen. Although everyone agrees that further field studies are required, practitioners considering future field studies have been left to wonder whether they should simply repeat the Illinois Study described in the Mecklenburg Report, or attempt to find a new design.

We have read the materials related to the Mecklenburg study, including the Mecklenburg Report, its Addendum and Appendices, the supportive comments of Dr. Roy Malpass (2006) and Dr. Ebbe Ebbesen (2006), and the critical comments of Dr. Gary Wells (2006) and Dr. Nancy Steblay (2006). The Report indicates, and all commentators seem to agree, that the study does contain a confound: a non-blind simultaneous procedure is compared with a blind sequential procedure. The bottom line issue here, or at least the one that drew our group's attention, concerns the importance of the confound.

It is easy to understand the sentiment expressed by Mecklenburg in her Addendum that not all variables can be controlled in a field study such as the one she designed and describes in the Report. Confounds can occur in laboratory studies as well as field studies. The issue that always arises in such cases concerns the implications of the confound: Is it critically related to interpreting the major outcome of the study? Or is the confound incidental to the main conclusion, such that even though the confound is acknowledged, the major results of the study are still interpretable?

The Mecklenburg Report asserts that "The Illinois Pilot Study was properly designed to answer the question: how do the current procedures compare with the proposed procedures, both in terms of identification rates and implementation?" From this perspective, the confound between blind/non-blind and sequential/simultaneous would not be critical, because non-blind simultaneous reflects the current procedure to which the blind/sequential procedure is compared. Unfortunately, this perspective seems seriously problematic.

Our reading of the materials forces us to conclude that the confound has devastating consequences for assessing the real-world implications of this particular study.

If it is the case that the better outcome from the non-blind/simultaneous procedure is partly or entirely attributable to subtle, unintentional cues provided by the administrator, then the Illinois results may simply underscore that the present procedure produces a biased outcome that may ultimately result in the increased conviction of innocent individuals. Stated slightly differently, it is critical to determine whether the seemingly better result from the simultaneous procedure is attributable to properties of the simultaneous procedure itself, or to the influence of the non-blind administrator.

We should note that under these testing conditions, if the results had shown the sequential lineup to be superior, one would not know whether it was really the use of the sequential lineup or the use of a blind investigator conducting the lineup that produced the result. Of course, any difference between conditions could be due to some combination of the factors. Even if no difference in outcome occurred between the procedures, one could not safely conclude there is no difference between them if the detectives were informed in one condition and not in the other. Thus, although the conditions used in the study made some sense from a practical standpoint, the design guaranteed that most outcomes would be difficult or impossible to interpret. The only way to sort this out is by conducting

further studies including, at a minimum, a blind/simultaneous condition (it would also be desirable to include a non-blind/sequential condition to fill out the design, but it is not an absolutely necessary condition for the present purposes).

In the materials we have reviewed, the Mecklenburg Report's detractors (including Wells) and its advocates (including Mecklenburg herself) disagree on whether the misidentification rates in two of the three participating jurisdictions (a zero rate of "filler" identifications) are suspiciously low. However, Wells cites enough evidence that they may be low to justify the concern that administrator bias is operating, either consciously or unconsciously; either by failing to count tentative "filler" choices, or in steering witnesses away from fillers, or toward suspects.

The problem is that we cannot know on the basis of the Mecklenburg study whether such bias is operating, even though the entire interpretation of the significance of the study for real-world practices hinges on this issue.

Mecklenburg states in her Addendum that the question of how blind administrators affect simultaneous lineups is one of several questions to be addressed in future studies. We certainly hope so. But the statement that follows is problematic: "However, the Illinois Pilot Program was not intended to answer those questions and any attempt to discredit the Illinois study on that basis is misguided."

If the Illinois study was not designed to address the question of what happens in a blind/simultaneous line-up, given its centrality to the issue, then our assessment is that the Illinois study addressed a question (comparing blind/sequential and non-blind/simultaneous) that is not worth addressing, because the results do not inform everyday practice in a useful manner.

No single field study can produce a final blueprint for procedural reform; we will need many. The design of these studies, however, will be crucial. A well-designed field study that avoids the flaw built into the Illinois effort, can be an important first step toward learning what we need to know about the best practices in identification procedures.

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